No. 94-357

SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE STATE OF WASHINGTON, *et al.*,

Petitioners,

v.

THE SPOKANE TRIBE OF INDIANS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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ALTERNATIVE STATEMENT OF QUESTIONS PRESENTED

Respondent Tribe agrees with the phrasing of Petitioner's Question #1

Question #2 is more appropriately framed as follows:

2. Whether, under *Ex parte Young,* 209 U.S. 123 (1908) and its progeny, a tribe may bring an action under the Indian Gaming Regulatory Act against individual state officials for prospective injunctive relief ordering those officials to comply with federal law.

If review is accepted, a third and fourth question are appropriately added:

3. In the event that the Eleventh Amendment precludes lawsuits by tribes against nonconsenting states or state officials, what remedy if any, is available to tribes against states that fail to conclude compact negotiations in good faith?

4. In the event that no remedy is otherwise available to tribes, whether IGRA, in its entirety, should be struck down as unconstitutional.

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OPINIONS BELOW

The opinion of the court below has been published since the filing of the Petition. The opinion is cited as *Spokane Tribe v. Washington State et al.*, 28 F.3d 991 (9th Cir. 1994).

CORRECTIONS TO PETITIONERS' "STATEMENT"

The Petitioners' "Statement" is accurate in most respects, however, a few points need correction or clarification.

First, the Petition at footnote 3, makes reference to approved compacts between Washington State and other tribes with Indian lands in Washington State. The footnote has no factual relevance to the Petition. The District Court has never reached the merits of the Tribe's claims, which would include a factual demonstration that the referenced compacts are the product of coercion and duress, and not the product of good faith negotiations required under IGRA.

Second, the Petition at page six, characterizes the lawsuit as "seeking a declaration that the State failed to negotiate in good faith." More clearly, the Tribe is seeking the remedies available under IGRA, including the appointment of a Mediator that is empowered to select a compact and to notify the Secretary of Interior of the state's refusal to consent to the selected compact.

ARGUMENTS FOR DENYING THE PETITION

No special or important reason exists favoring review of the opinion below. Contrary to the assertions of Washington State and the amici states, this case involves no more than the application of well-settled principles to a familar situation. Although the Eleventh Circuit conflicts, in reasoning but not in ultimate result, with the Eighth, Ninth & Tenth Circuits, it is not the type of real and embarrassing conflict that justifies the use of this Court's scarce judicial resources. In the even that this Court does grant review, the Court should consider what remedies, if any, are available to tribes under the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§2701 et seq. (IGRA), when confronted with state governments hostile to IGRA's compacting process.

I.

THE STATES' PERCEIVED CONFLICT IS AN ANOMALY, WHICH DOES NOT ALTER THE REMEDY ULTIMATELY AVAILABLE TO TRIBES UNDER IGRA; AND IS NOT THE TYPE OF REAL AND EMBARRASSING CONFLICT, WHICH JUSTIFIES THE USE OF THE COURT'S JUDICIAL RESOURCES.

Four Circuit courts have addressed the specific issue, in the context of suits brought under the IGRA, of whether Congress has the power to abrogate the states' Eleventh Amendment immunity from suit in federal court pursuant to the Indian Commerce Clause. The Ninth Circuit in the Opinion issued below, ruled that Congress has such authority. The Eighth Circuit previously issued a consistent opinion in *Cheyenne River Sioux Tribe v. South Dakota,* 3 F.3d 273 (8th Cir. 1993). Since the date of Washington State's filing of the Petition, the Tenth Circuit has issued its opinion in *Ponca Tribe of Oklahoma v. Oklahoma,* ___ F.3d ___ , 1994 WL 476316 (10th Cir. September 2, 1994), which concurs in the analysis of the Opinion below in every respect. In each of these cases, the courts upheld a process wherein the Department of Interior may ultimately promulgate procedures in lieu of a compact for a tribe's class III gaming operation if the tribe is confronted with a hostile state government that refuses to consent to the process provided for in IGRA. The decision rendered in the Eleventh Circuit, *Seminole Tribe of Florida v. Florida,* 11 F.3d 1016 (11th Cir. 1994), ruled that Congress did not have such authority to abrogate the states' Eleventh Amendment immunity, but also ruled that tribes confronted with states that hide behind the Eleventh Amendment may directly proceed to the Department of Interior (DOI) for the procedures in lieu of a compact. *Id.* at 1029.

Those four appellate decisions should be the focus of this Court's attention in determining whether to grant review. Except for the anomaly in the Eleventh Circuit, there is no other conflict in the courts on the issue. The recent opinion in *Ponca Tribe,* overturned those decisions adopting the states' position in Oklahoma[1] and New Mexico[2]. The appeal that had been pending in the Fourth Circuit, *Eastern Band of Cherokee Indians v. North Carolina,* No. 2:92-CV-239 slip op. (W.D.N.C. June 16, 1993) *appeal docketed,* No. 93-1936 (4th Cir. 1993), has been dismised with the consent of the parties because an agreement has rendered the appeal moot. The Amici states make note of several pending cases (Brief of Amicus Curiae States at p. 7 n.2) but they are in the Ninth Circuit and are resolved by the Opinion below. The only Circuit with a dispositive case still pending before it is the Fifth Circuit review of *Ysleta del Sur Pueblo v. Texas,* 852 F.Supp. 587 (W.D. Texas 1993) *appeal docketed,* (5th Cir. 1993). The District Court decision in Texas is consistent with the Ninth Circuit in all respects.

Each of the four Circuit courts, which have addressed the issue to date, ruled that tribes confronted with hostile state governments are ultimately entitled to relief in the form of procedures promulgated by the Department of the Interior. Respondent Washington State correctly points out that the Eleventh Circuit did rule in a manner

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[1] *Ponca Tribe of Oklahoma v. Oklahoma,* 834 F. Supp. 1341 (W.D. Okla 1992).

[2] *Pueblo of Sandia v. New Mexico,* No. CIV 92-613-JC slip op. (D. N.M. Nov. 13, 1992) & *Apache Tribe of Mescalero Reservation v. New Mexico,* No. CIV 92-076-JC slip op. (D. N.M. Dec. 22, 1992).

inconsistent with the analysis of the Eighth Circuit, and with the opinion below. The difference in analysis does not change the ultimate remedy available to tribes, however. The most recent decision in the Tenth Circuit buttresses the opinion below and suggests that the analysis of the Eleventh Circuit is an anomaly, not needing of the imposition of the limited resources of this Court for review.

The Eleventh Circuit based its decision on the assumption that *Pennsylvania v. Union Gas,* 491 U.S. 1 (1989), is no longer good law. *Union Gas* held that those plenary powers inherent in the Interstate Commerce Clause authorized Congress to abrogate Eleventh Amendment Immunity in matters involving interstate commerce. The anomaly in the Eleventh Circuit results from the somewhat arrogant assumption that a change in the personnel of this Court will cause the Court to overturn its 1989 decision in *Union Gas.* This approach brought direct and appropriate criticism by both the Ninth and Tenth Circuit courts:

> [T]he Eleventh Circuit questioned the continuing vitality of the *Union Gas* decision in light of changing Supreme Court membership and the lack of majority opinion. The case, however, remains binding authority upon us.

Spokane Tribe, 28 F.3d at 997.

> In an attempt to sap *Union Gas* of any doctrinal significance, the states in the instant cases first make much of the fact that the court was splintered in *Union Gas* and that Justice White, the fifth vote on the Commerce Clause abrogation question, stated that he did "not agree with much of [Justice Brennan's] reasoning." Id. at 57. However, we are unwilling to sweep aside *Union Gas* as lacking prece-

> dential value or guidance for our analysis. . . . It is beyond dispute that five Justices in *Union Gas* held that Congress possesses the power to abrogate Eleventh Amendment immunity pursuant to the Interstate Commerce Clause of Article I.

Ponca Tribe, 1994 WL 476316 (printout at p. 8).

The analysis of the Eighth, Ninth, and Tenth Circuits involves no more than the application of well-settled principles to a familar situation. The case law is well settled that Congress, acting pursuant to its plenary powers, has the authority in the Constitution to abrogate state soversign immunity. *Pennsylvania v. Union Gas,* 491 U.S. 1 (1989), *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976). When the Supreme Court reviewed the plenary powers of Congress in abrogating Eleventh Amendment Immunity in *Union Gas,* it decided the harder case – the Interstate Commerce Clause. As the Ninth and Tenth Circuits have pointed out, the plenary powers of Congress derived from the Interstate Commerce Clause have substantive limitations upon them. Such limitations that are not shared with plenary powers derived from the Indian Commerce Clause. *Spokane Tribe,* 28 F.3d at 997; *Ponca Tribe,* 1994 WL 476316 (printout at p. 8). A review of *Union Gas* is the real objective of Washington State (Petition at pp. 16-18) and the amici states (Brief of Amicus Curiae States at pp. 5-7).

The nature of Congress' plenary authority over Indian country is quite basic, and subject to verification by numerous decisions of this court. The Brief of Amici States, however, demonstrates a basic misperception of state governments towards their role in Indian gaming. The Brief of Amici States candidly concedes: "As is evident, however, Congress has plenary and absolute power

in Indian affairs and states are not essential to that power" (Brief of Amici States at page 12). Yet, the entire Brief is couched in such terms as "degradation" of the state's jurisdiction, "displacement and dismissal of the sovereign rights of the states," and "undermining our federal system of government."[3] Because the Congress has plenary power, there is no reservoir of rights that states have, or ever had, in governing gaming on Indian lands. Consequently, IGRA cannot take something away from the states because they never had it to begin with.

The fundamental relationship of matters of interstate commerce should be revisited in the context of litigation between a state or states and the United States. Acceptance of this litigation to resolve the issues in *Union Gas* places the Respondent Tribe in the untenable position of defending the powers of the United States over states. By contrast, the Indian Commerce Clause involves plenary powers that are far more conclusive than the Interstate Commerce Clause, hence, the Eighth, Ninth and Tenth Circuits, applied well-settled law. Judge Schroeder, in the Opinion below, emphasized this critical distinction:

> Moreover, even if the Supreme Court were to overrule *Union Gas,* and hold that Congress' power to regulate interstate commerce does not permit Congress to abrogate soversign immunity, Congress' broader authority over tribal affairs would remain.

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[3]The Amici States also use these arguments to premise some infringement upon or violation of the Tenth Amendment. The appeal to the Ninth Circuit did not include Tenth Amendment challenges. Petitioners had asserted the argument for the very first time in their Reply Brief to the Ninth Circuit. The Ninth Circuit did not address the issue to any degree. Accordingly, the Tenth Amendment should not be used as basis for granting the Petition.

Spokane Tribe, 28 F.3d at 997. The context of the instant litigation is not the proper context for revisiting *Union Gas.*

Given that all Circuits concur in the ultimate remedy for tribes (DOI regulations), the resolution of the constitutional issue becomes merely hypothetical and does not justify a writ. See *Ticor Title Insurance Co. v. Brown,* ___ U.S. ___, 114 S.Ct. 1359, 1361-62 (1994). The resolution of the issue would only result in mapping the road for tribes to obtain federal DOI regulations governing the regulation of class III games in lieu of a compact. The resolution of the Constitutional issue is better made in a context where it is the dispositive issue.

To the extent that the perceived conflict between the Circuits is substantive, Congress may be the more appropriate forum to resolve the perceived conflict. See *Braxton v. United States,* 500 U.S. 344, 348, 111 S.Ct. 1854, 1858 (1991). Congress is perfectly able to draft legislation that provides a federal remedy to tribes in the event that a remedy involving a state government is unavailable, for whatever reason. Such a legislative scheme is wholly consistent with the remarks of Judge Schroder, below:

> In grappling with the sensitive issues following the state of California's defeat in *Cabazon Band,*[4] Congress tried to fashion a plan that would enable states to have a voice in how tribal gaming should operate and to enforce to some degree the states' own laws. The states' immunity from suits under the Eleventh Amendment should not frustrate that goal. Indeed, principles of state sovereignty are singularly out of place in such a scheme, where the federal government is tailoring a limited grant of power to

[4] *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987).

> the states. In this case, sovereign immunity would undermine rather than promote the assertion of state interests.

Spokane Tribe, 28 F.3d at 997.

In short, the states' perceived conflict in the circuits is an anomaly, which does not alter the remedy ultimately available to tribes under IGRA. The anomaly is not the type of real and embarrassing conflict, which justifies the use of the Court's judicial resources.

II.

IF REVIEW IS GRANTED, THE COURT SHOULD INCLUDE IN ITS REVIEW ADDITIONAL SUBSTANTIVE ISSUES THAT BECOME GERMANE IF THE STATES ARE IMMUNE TO LAWSUITS UNDER IGRA.

A. *Ex parte Young* and its progeny.

The District Court below ruled that it did have jurisdiction over defendant state officials in their official capacity, even though it opined that it was compelled to dismiss Washington State on the grounds of Eleventh Amendment immunity. 790 F. Supp. 1057 (E.D. Wash. 1991). The Ninth Circuit, below, vacated the portion of the District Court's Order regarding state officials on the grounds that it was not needed given that Washington State is not immune from suit. 28 F.3d at 998.

The second issue, as framed by Washington State, begs the question as if the naming of state officials is a mere perfunctory act. The Tribe is not "simply naming state officers as defendants." A substantive review of the issue requires the court to look into the nature of the prospective equitable relief sought by the Tribe. State officials should not be allowed to apply state laws against tribal gaming operations in a manner that is inconsistent

with preemptive federal law. The issue is more appropriately framed as follows:

> 2. Whether, under *Ex parte Young,* and its progeny, a tribe may bring an action under the Indian Gaming Regulatory Act against individual state officials for prospective injunctive relief ordering those officials to comply with federal law.

Only if issue #1 (Congressional abrogation) is reviewed by this Court, should this Court also review issue #2 (*Ex parte Young*) as framed above. If issue #1 is to be reviewed, the Respondent Spokane Tribe concurs in the conclusion, but not in the analysis, of Washington State that issue #2, as framed above, should be reviewed by this Court. If jurisdiction over state officials does exist in lawsuits brought by tribes under IGRA, then the constitutional integrity of the act can be saved.

B. If review is granted, the Court should also apply severance analysis to IGRA to determine what remedies, if any, are available to tribes confronted by state governments hostile to IGRA's process.

If the states prevail on issues ##1 (Congressional abrogation) & 2 (*Ex parte Young*), the question remains as to what remedy, if any, is available to tribes confronted by hostile state governments. The Eleventh Circuit turned to this issue in its determination that tribes may proceed to the Department of Interior for procedures in lieu of a compact. *Seminole Tribe,* 11 F.3d at 1029. The federal District Court in *Willis v. Fordice,* 850 F. Supp. 523 (S.D. Miss. 1994) reinforces the Tribe's position in the event IGRA violates the Eleventh Amendment:

> Alternatively, even if IGRA is unconstitutional, the Court must adhere to the decisions of the United States Supreme Court. Therefore, under the

> holding from *Cabazon*, the Court finds that even if Congress lacked the authority to set forth the procedures under IGRA and abrogate the Eleventh Amendment immunity of the states, gaming must still be allowed on Indian lands.

850 F. Supp. at 530. See also, *Confederated Tribes of the Colville Reservation v. Washington*, 20 ILR 3124 (E.D. Wash. 1993) ("If this court were to sever only the mandatory language from IGRA, the Tribe would be left without recourse if they are unable to reach an agreement with the State. . . . Therefore the entire subsection (d) regarding Class III gaming must be severed from the act as unconstitutional"). Accordingly, the Respondent Tribe submits issues ##3 & 4:

> 3. In the event that the Eleventh Amendment precludes lawsuits by tribes against nonconsenting states or state officials, what remedy if any, is available to tribes against states that fail to conclude compact negotiations in good faith?
>
> 4. In the event that no remedy is otherwise available to tribes, whether the Indian Gaming Regulatory Act, in its entirety, should be struck down as unconstitutional.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied. However, in the event that review is granted, the issues should be those identified above such that in the event states are found to be immune from suits by tribes under IGRA, the remedies otherwise available to tribes should also be determined.

Respectfully submitted,

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